liable, though he has employed an experienced contractor and though the owner is himself unskilled in the particular work to be done.

2. If the work is one that, if properly done, no injurious consequences are likely to arise, the owner is protected from liability by the employment of an experienced contractor.

3. If the resulting injury is collateral to the main work and flows from the negligent act of the employee alone, and is not one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, the contractor but not the owner of the premises is liable.

Lord Cockburn's statement of the rule is the clearest and most pointed to be found, yet, when the facts of each case are tested by it, the wise utterance of the Commander of the "Cautious Clara" recurs to one's mind as descriptive of the principle announced by Lord Cockburn—"The bearings of this observation lays in the application on it."

WYNDHAM R. MEREDITH.

Richmond, Va.

WHEN RIGHT TO CLAIM HOMESTEAD EXEMPTIONS CEASES.

When a householder has regularly set apart the homestead exemption, his right to claim the same continues until his death, notwithstanding he may cease to be a *householder* in the technical sense of the term. Although he may cease to be the "head of the family," yet he may still hold the homestead for the benefit of himself. Such was the decision of our Supreme Court of Appeals in *Wilkinson* v. *Merrill*, 87 Va. 513.

The soundness of the decision in *Wilkinson* v. *Merrill* has been questioned by the Virginia bar. The decision in the case was based upon the homestead article in the Constitution of Virginia.

Section 3649 of the Code of Virginia provides that the right to claim the exemption shall cease when a person ceases to be a householder. The first clause of the section reads thus:

"When any person, entitled as a householder to the exemption provided for in section thirty six hundred and thirty, ceases to be a householder, or when any person removes from this State, his right to claim or hold any estate as exempt under the provisions of this chapter, shall cease."

This section and the law as laid down in *Wilkinson* v. *Merrill* are

in direct conflict, and this section according to the law of that case is unconstitutional. It is strange, however, that the court in its opinion in *Wilkinson* v. *Merrill*, did not refer to section 3649 of the Code, although the said section was in existence when the case was decided both in the lower and the appellate court.

The language of the constitutional provision, "set apart and hold for himself and family," and, "set apart and hold for the benefit of himself and family," under the liberal construction which is required to be put upon the homestead article in the Constitution, would seem to indicate that the exemption was intended for the benefit of the householder *himself* as well as for the family, and therefore to entitle him to hold the same "for the benefit of himself" after he has ceased to be technically a householder. But the exemption is not primarily for his benefit. The policy and intent of the homestead law are to provide for the family, and to shield and protect them from the improvidence of the head of the family.

Had the Constitution omitted the words "hold for the benefit of himself and family," and, instead thereof, the constitutional provision had been simply "set apart and hold for the benefit of his *family*," then the householder would probably have been cut out from any participation in the enjoyment of the exemption. Does the constitutional provision mean and intend that the householder shall enjoy the exemption only so long as he may be the "head of a family?"

If this is the true construction of the homestead article, then there are contingencies when the provision, instead of being a shield and protection against want and suffering, would be but a snare to lull the claimant into a false security. Take the case of a man who, at seventy years of age, is the head of a family and enjoying the homestead, which is all the property he owns, and dependent upon it for a livelihood. Suppose then the member or members constituting his family should die, and he is no longer a head of a family: Is the exemption then in his favor to cease, and the homestead to be taken from him by his creditors, and he be made to add the misery of poverty to that of age? If the homestead law should allow such a case, could it be called a humane provision for the needy and helpless?

But, on the other hand, it can be said, though not with equal weight, that a young man twenty-five years of age might be "a head of a family" by reason of his having dependent upon him for support some distant relative, whose age was such that it would be a certainty that he could not long be in the young man's family, and debts

be contracted by the young householder against which he could claim the exemption for probably half a century after he had ceased to be the head of a family. And this, simply because he had maintained and supported, it may be for only a year or two, some distant kinsman who had been dependent upon him for support. Would not the advantage in such a case be out of proportion to the duty? Yet, one could scarcely call the case a harsh one on the creditor, because he is presumed to know the law, and should know that the homestead could always be claimed against his debt, and therefore he should have required its waiver.

Section 5 of Article XI of the Constitution confers upon the general assembly the power to prescribe in what manner and on what conditions a householder or head of a family shall thereafter set apart and hold for himself and family a homestead out of any property thereby exempted, and in its discretion to determine *in what manner and on what conditions* he may thereafter hold "for the benefit of himself and family" such homestead. It might be very plausibly argued from this section that the general assembly could prescribe the conditions upon which the householder should hold the homestead. But it is expressly declared in the last clause of that section of the Constitution, that nothing contained therein shall be construed as authorizing the general assembly to defeat or impair the benefits intended to be conferred by the provisions of the said homestead article.

In view of the fact that the provisions of the homestead article are required to be construed liberally, "to the end that all the intents thereof may be fully and perfectly carried out," it would seem that all doubts arising should be solved in favor of the extension of the benefits of the exemption where such would not be plainly contrary to the letter of the homestead article of the Constitution.

Does *Wilkinson* v. *Merrill* (*supra*) in effect overrule the case of *Calhoun* v. *Williams*, 32 Gratt. 18?

Apparently the two cases are in conflict, but the exact questions decided in each case were distinctly different.

In *Calhoun* v. *Williams* the question to be determined was: Who is a householder or head of a family as contemplated by the Constitution? In *Wilkinson* v. *Merrill* the question was: When does a person cease to be a householder or head of a family? The two cases are not necessarily in conflict. In the latter case the court held that the householder, according to the language of the constitutional provision,

had vested rights in the exempted property after it had once been claimed and set apart.

While there is undoubtedly room for a difference of opinion on the subject, yet reason seems to slightly preponderate in favor of the soundness of the law as laid down in *Wilkinson* v. *Merrill.*

It seems to be the impression of the profession of the State that section 3649 of the Code of Virginia has repealed the law of *Wilkinson* v. *Merrill,* but such is not the case. As hereinbefore shown, that decision was based on the Constitution, and the statute, according to that case, is in conflict with the Constitution. The object of section 3649 could not have been to repeal *Wilkinson* v. *Merrill,* for that statute was law before the case was decided.

Section 3649 of the Code is a quite lengthy one, and contains another important provision which is distinct from the unconstitutional clause. The last clause of the section gives to the householder the right to alien his homestead free from liens that are not paramount thereto. In *Williams* v. *Watkins,* 92 Va. 685, Judge Harrison, in delivering the opinion of the court, says:

"If the homestead could not be disposed of, or used as a basis of credit, it would be of little value to those dependent upon it. To restrict the right of alienation would practically defeat the humane purpose of the Constitution in making this provision for the needy and helpless."

And the court refers to section 3649 as the basis of its decision of this question of the right of alienation of the homestead.

In *Blose* v. *Bear,* 87 Va. 177, it was held that a deed of trust executed during the occupancy of the land as a homestead, did not take priority over a judgment lien which had attached before the execution of the deed of trust. Under section 3649 and *Williams* v. *Watkins* (*supra*) the deed of trust would take priority over the judgment lien.

The first clause of section 3649 is unconstitutional, but it does not necessarily follow that the other provisions of the section are open to the same objection. A statute may be constitutional in some of its provisions and unconstitutional in others; but if the parts can be so separated as that each can stand as the will of the legislature, the good does not perish with the bad. *Trimble's Case,* 96 Va. 821. The constitutional and the unconstitutional parts of section 3649 are distinctly separable, and the part giving the right of alienation of the homestead is valid.

When the homestead exemption has once been regularly set apart it cannot be mortgaged, encumbered or aliened by the householder,

if a married man, except by the joint deed of himself and his wife. Va. Code, sec. 3634. The following case, involving the requirement of this statute, has arisen in the writer's practice:

A, being a married man but without children, conveyed the homestead to B, by deed in which the wife did not join. After the conveyance, the wife died but left no children. Is the conveyance from A to B good, the wife not having joined therein in accordance with the statute? It surely would not be good as against her, but she having died and leaving no children, it would seem that the conveyance is probably a valid one. The creditor of the husband could only subject (and that only after his death) "such only of that estate as he (A) may be possessed of or entitled to at the time the exemption thereof ceases." Va. Code, sec. 3649. How could A be "possessed of or entitled to" any part of the property after he had made the deed, and thereby done everything in his power to part with his interest therein? *

C. HOBHOUSE PATTESON.

Buckingham, Va.

* See *Va.-Tenn. Coal and Iron Co.* v. *McClelland, post*, p. 166.—EDITOR.